

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD KREFTING, individually and on  
behalf of all others similarly situated,  
Plaintiff,

v.

KAYE-SMITH ENTERPRISES INC and  
BOEING EMPLOYEE CREDIT UNION,  
Defendants.

CASE NO. 2:23-cv-220

ORDER TRANSFERRING CASE TO  
DISTRICT OF OREGON

Plaintiff Richard Krefting filed this putative class action against Defendants Boeing Employees' Credit Union ("BECU") and Kaye-Smith Enterprises on February 17, 2023, alleging damages caused by a data breach and unauthorized access to his personally identifiable information. Over 100 days earlier, Richard Smith filed a putative class action against Kaye-Smith stemming from the same data breach in U.S. District Court for the District of Oregon in *Smith et. al. v. Kaye-Smith Enters., Inc.*, 3:22-cv-01499-AR (D. Or.) (referenced here as the "*Smith Lawsuit*").

Smith now moves for limited intervention in this action, arguing Krefting's case should be stayed or transferred to the District of Oregon under the "first-to-file rule," which permits district courts to decline jurisdiction over an action when a complaint involving essentially the

1 same parties and issues has already been filed in another district. Smith makes a good point, and  
2 for the reasons explained below, the Court GRANTS his motion and transfers this action to the  
3 District of Oregon.

#### 4 **BACKGROUND**

5 BECU's printing vendor, Kaye-Smith, experienced a data breach in June 2022 that  
6 affected thousands of BECU customers. BECU notified its customers, like Krefting and Smith,  
7 of the data breach. Krefting and Smith each filed a putative class action on behalf of themselves  
8 and other BECU members who were impacted by the June 2022 data breach incident involving  
9 data stored by Kaye-Smith.

10 On October 6, 2022, Smith filed his current action against Kaye-Smith Enterprises in the  
11 District of Oregon, on behalf of a nation-wide class of impacted individuals. *Smith Lawsuit*, Dkt.  
12 No. 1. Smith defined the proposed class as follows:

13 All persons residing in the United States whose personally identifiable information  
14 Kaye-Smith obtained, stored, and/or shared and which was exposed to an  
unauthorized party as the result of the data breach referenced in BECU's  
correspondence to Plaintiff Smith dated July 25, 2022.

15 *Smith Lawsuit*, Dkt. No. 1 at 17.

16 On February 17, 2023, Krefting filed this action against both BECU and Kaye-Smith  
17 Enterprises, on behalf of two classes of individuals, a nation-wide class and a class of individuals  
18 residing in the State of Washington. Dkt. No. 1 at 22. Krefting defines his proposed classes as  
19 follows:

20 Nationwide Class

21 All persons whose Private Information was compromised as a result of the Data Breach.

22 Washington Subclass

23 All persons residing in Washington whose Private Information was compromised as a  
24 result of the Data Breach.

Dkt. No. 1 at 22.

1 On January 6, 2023, Magistrate Judge Armistead for the District of Oregon appointed  
2 Smith's counsel as interim class counsel in the *Smith Lawsuit*. *Smith Lawsuit*, Dkt. No. 28.

3 On April 13, 2023, Smith moved to intervene and to transfer or stay this action. Dkt. No.  
4 17. Defendant Kaye-Smith does not oppose the motion. Dkt. No. 20. But Krefting opposes  
5 Smith's request. Dkt. No. 21. And so does Defendant BECU. Dkt. No. 26.

## 6 DISCUSSION

7 Smith argues that he has a right to intervene in the *Krefting Lawsuit* under Fed. R. Civ. P.  
8 24(a)(2) or, in the alternative, that he should be granted permissive intervention under Fed. R. Civ.  
9 P. 24(b)(1).

### 10 I. Limited intervention.

#### 11 A. Intervention as a matter of right.

12 A nonparty has a right to intervene under Rule 24(a)(2) "when it (i) timely moves to  
13 intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may  
14 have that interest impaired by the disposition of the action; and (iv) will not be adequately  
15 represented by existing parties." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir.  
16 2022). "In determining whether intervention is appropriate, courts are guided primarily by  
17 practical and equitable considerations, and the requirements for intervention are broadly  
18 interpreted in favor of intervention." *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148  
19 (9th Cir. 2010). The proposed intervenor bears the burden of showing that all requirements have  
20 been met. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). The  
21 application for intervention as of right cannot be granted if even one of these elements is not met.  
22 *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). The Court  
23 need not analyze each element because it finds that Smith does not satisfy the third and fourth  
24 factors.

1 Under the third factor for intervention as a matter of right, the proposed intervenor “must  
2 be situated such that the disposition of the action may, as a practical matter, impair or impede its  
3 ability to protect its interests.” *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1151–52 (9th  
4 Cir. 2010). Krefting argues that even if Smith has a protectable interest in the action, he does not  
5 need to intervene to protect his interest. He asserts that Smith has other options to protect his  
6 interests, such as objecting to a settlement. The Court agrees. Smith’s interests will not be  
7 impaired absent intervention. If the parties reach a class action settlement, Smith may raise any  
8 concerns as an objector. *See* Fed. R. Civ. P. 23(e)(5) (“Any class member may object to the  
9 proposal if it requires court approval....”). The Court will hear his objections at that time.  
10 Moreover, before a district court approves a proposed class action settlement, the court must  
11 conclude that the settlement is “fair, reasonable, and adequate” and that the plaintiffs and class  
12 counsel have “adequately represented the class.” Fed. R. Civ. P. 23(e)(2). So there is another  
13 mechanism built into the class action procedure to protect Smith’s interests.

14 Under the fourth factor—whether the proposed intervenor would be represented  
15 adequately by the existing parties—courts consider whether “(1) the interests of the existing  
16 parties are such that they would undoubtedly make all of the non-party’s arguments; (2) the  
17 existing parties are capable of and willing to make such arguments; and (3) the non-party would  
18 offer no necessary element to the proceeding that existing parties would neglect.” *Sw. Ctr. for*  
19 *Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998). Here, Smith and  
20 Krefting have filed substantially similar actions against Kaye-Smith seeking similar relief.  
21 Indeed, Smith falls within both of the subclass definitions proposed by Krefting and they have  
22 the same interests in the outcome of any action against Kaye-Smith. Smith fails to point to a  
23 specific and distinct difference in interests. *See Citizens for Balanced Use v. Mont. Wilderness*  
24 *Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (“If an applicant for intervention and an existing party

1 share the same ultimate objective, a presumption of adequacy of representation arises.”). Smith  
2 also does not point to any evidence that Krefting or his counsel are inadequate.

3 Smith argues that the Court’s analysis is irrelevant because District of Oregon Magistrate  
4 Judge Armistead has already appointed his counsel as interim class counsel. But this is only an  
5 argument and Smith provides no legal authority in support of his claim. Because Smith does not  
6 meet the test as defined by the Ninth Circuit for intervention as a matter of right, the Court will  
7 end its analysis there.

8 **B. Permissive intervention.**

9 Although Smith has not demonstrated that he is entitled to intervention as a matter of  
10 right, the Court is convinced that Smith should be permitted to intervene permissibly because he  
11 satisfies the requirements of Rule 24(b)(1)(b). Permissive intervention “requires (1) an  
12 independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and  
13 fact between the movant's claim or defense and the main action.” *Freedom from Religion*  
14 *Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). “On timely motion, the court may  
15 permit anyone to intervene who is given a conditional right to intervene by a federal statute; or  
16 has a claim or defense that shares with the main action a common question of law or fact.” Fed.  
17 R. Civ. P. 24(b).

18 First, the Court has diversity jurisdiction over Smith’s case under 28 U.S.C. § 1332(d)(2)  
19 because (a) there are 100 or more Class members, (b) intervenor is a citizen of a state that is  
20 diverse from Defendant’s citizenship, and (c) the matter in controversy exceeds \$5,000,000,  
21 exclusive of interests and costs. *See Smith Lawsuit*, Dkt. No. 1 at ¶¶ 11–12. The Court finds that  
22 the jurisdiction requirement is satisfied.

23 Next, Smith has timely filed his motion to intervene. Although the Court must be stricter  
24 in its application of the timeliness factors for permissive intervention than it is for intervention as

1 of right, timeliness is not an issue here. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d  
2 1297, 1308 (9th Cir. 1997). Smith filed his motion to intervene early enough in the litigation that  
3 neither party will be prejudiced.

4 Finally, Smith's claims have questions of law and fact in common with Krefting's.  
5 Indeed, Smith's interests arise from an identical nucleus of facts. Both Smith and Krefting seek  
6 to hold Kaye-Smith liable for the data breach that impacted their personally identifiable  
7 information. The cases also have some overlapping claims.

8 Smith meets the requirements for permissive intervention. The Court will allow Smith to  
9 intervene for the limited purpose of his request to either transfer this case to the District of  
10 Oregon or to stay this case pending resolution of the *Smith Lawsuit*.

## 11 **II. First-to-file rule.**

12 Smith seeks to invoke the first-to-file rule, asking the Court to either transfer this case to  
13 be consolidated with the first-filed *Smith Lawsuit* or to stay this case pending resolution of the  
14 *Smith Lawsuit*. The first-to-file rule is a "generally recognized doctrine of federal comity which  
15 permits a district court to decline jurisdiction over an action when a complaint involving the  
16 same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v.*  
17 *Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982). "The first-to-file rule is intended to serve  
18 the purpose of promoting efficiency well and should not be disregarded lightly." *Kohn L. Grp.,*  
19 *Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015). "The purpose of the rule  
20 is to eliminate wasteful duplicative litigation, to avoid rulings that may trench upon a sister  
21 court's authority, and to avoid piecemeal resolution of issues calling for a uniform result."  
22 *Pecznick v. Amazon.com, Inc.*, No. 2:22-CV-00743-TL, 2022 WL 4483123, at \*2 (W.D. Wash.  
23 Sept. 27, 2022) (citation omitted).

1 In determining whether to apply the first-to-file rule, courts consider the (1) chronology  
2 of the lawsuits, (2) similarity of the parties, and (3) similarity of the issues. *Kohn Law Grp., Inc.*  
3 *v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015).

4 First, the *Smith Lawsuit* was the first-filed case. Next, the parties do not contest that  
5 plaintiffs in both suits are similarly situated and that their proposed class definitions have  
6 substantial overlap. *See Ctr. v. Pompeo*, No. C18-1122JLR, 2018 WL 6523135, at \*5 (W.D.  
7 Wash. Dec. 12, 2018) (“In the context of class actions, a court should compare the putative  
8 classes, rather than the named plaintiffs, to determine whether the classes encompass at least  
9 some of the same individuals.”). The putative class of Washington residents and the nation-wide  
10 class in this case are subsumed within the putative nationwide class of individuals proposed in  
11 the *Smith Lawsuit*. In other words, one of Krefting’s proposed classes is a subset of the class that  
12 Smith seeks to represent and the other is the identical class.

13 The addition of BECU as a Defendant “does not *necessarily* allow [the] later-filed action  
14 to evade the first-to-file bar.” *Cho v. Surgery Partners, Inc.*, 30 F.4th 1035, 1043 (11th Cir.  
15 2022). Courts have “found non-identical defendants to be substantially similar” when the  
16 “actions have generally involved multiple defendants with at least some overlapping defendants  
17 in each suit.” *Edmonds v. Amazon.com, Inc.*, No. C19-1613JLR, 2020 WL 5815745, at \*6 (W.D.  
18 Wash. Sept. 30, 2020) (citing *Bewley v. CVS Health Corp.*, No. C17-802RSL, 2017 WL  
19 5158443, at \*2 (W.D. Wash. Nov. 7, 2017)). The Court finds that the plaintiff and defendants in  
20 this case are substantially similar to those in the *Smith Lawsuit*. The addition of BECU in  
21 Krefting’s case does not restrict the Court from applying the first-to-file rule.

22 Finally, the issues are also “substantially similar.” *See Kohn Law Grp.*, 787 F.3d at 1240  
23 (“The issues in both cases also need not be identical, only substantially similar.”). This means  
24

1 that the issues do not have to be identical, only that there is “substantial overlap” between the  
2 two suits. *Id.* Both lawsuits address the same single data breach of Kaye-Smith’s servers. The  
3 claims are based on the same facts and similar legal theories. Krefting raised concerns regarding  
4 joint and several liability because BECU is not a defendant in the *Smith Lawsuit*. Notably, only a  
5 limited number of claims currently remain against BECU in Krefting’s lawsuit. *See* Dkt. No. 44.  
6 Regardless Krefting’s concerns regarding joint and several liability do not prevent the  
7 application of the first-to-file rule. The Court leaves it to the discretion of the District of Oregon  
8 to address any issues concerning joint and several liability to the extent they arise.

9 The Court will apply the first-to-file rule in this case. Thus, the only remaining question  
10 is whether this case should be stayed or transferred. The Court finds that transfer of this case to  
11 the District of Oregon would best serve the interest of justice and efficiency. Given the similarity  
12 of the parties and issues, a transfer of this action will eliminate the risk of inconsistent rulings  
13 and serve the principles of efficiency, economy, and comity by avoiding duplicate and inefficient  
14 actions proceeding in separate districts. Whether the cases should be consolidated will be left to  
15 the District of Oregon’s sound discretion.

### 16 CONCLUSION

17 For the reasons set forth above, Smith’s motion for leave for limited intervention to  
18 transfer or stay action (Dkt. No. 17) is GRANTED. Smith is GRANTED limited intervention  
19 pursuant to Fed. R. Civ. P. 24(b)(1)(b). Krefting’s case and all pending motions are  
20 TRANSFERRED to the District of Oregon.

21 Dated this 28th day of July, 2023.

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23 \_\_\_\_\_  
Jamal N. Whitehead  
24 United States District Judge